

FILED

BEFORE THE NORTH CAROLINA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION OCT 17 2022  
RALEIGH, NORTH CAROLINA

NC Occupational & Safety  
Review Commission

COMMISSIONER OF LABOR FOR THE STATE OF NORTH CAROLINA	)	DOCKET NO: 2020 - 6322
	)	
Complainant,	)	INSPECTION NO: 318194313
	)	
v.	)	CSHO ID: # T7379
	)	
KMS ROOFING/SHEET METAL, LLC and its successors	)	<u>DECISION AND ORDER</u>
	)	
Respondent.	)	

THIS CAUSE came on for hearing and was heard before the undersigned R. Joyce Garrett, Hearing Examiner for the North Carolina Occupational Safety and Health Review Commission, on October 6, 2022 pursuant to a Notice of Hearing. Stacey Phipps, Assistant Attorney General, North Carolina Department of Justice, appeared for Complainant. Kevin Wilson, Manager of KMS Roofing/Sheet Metal, LLC, appeared pro se for Respondent. No affected employee of Respondent, or its representative, attended to have a say in, or participate as a party in, the Hearing.

There were no preliminary matters or motions to consider, however certain stipulations were agreed to by both parties (the "Stipulations"). No opening or closing statements were made by either party. Complainant objected to Mr. Wilson, pro se representative of Respondent, being allowed to appear by telephonic connection rather than by video. Such objection was noted for the record but the Hearing continued based on the Notice of Hearing stating "BE IT KNOWN by all interested parties to the above action that an Administrative Hearing will be held via the internet and/or telephone on OCTOBER 6, 2022 at 10:00 a.m." It is noted for the record that (i) in the latter part of the Hearing Mr. Wilson was able to appear by video, and (ii) the Compliance Safety and Health Officer who was called as a witness by Complainant appeared by telephonic connection rather than by video.

At the Hearing Complainant called as witnesses the following: (1) Compliance Safety and Health Officer Alexa Cherry and (2) Mr. Kevin Wilson. Respondent's only witness was Mr. Kevin Wilson, Manager of Respondent.

Based on the Stipulations at the time of the Hearing, and on the testimony/evidence presented at the Hearing and considering the record and the arguments of the parties, and applicable law, the Undersigned makes the following Findings of Fact and Conclusions of Law.

## FINDINGS OF FACT

1. The Complainant as Commissioner of Labor of the State of North Carolina is charged by law with compliance with and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina, Article 16, Chapter 95 of the General Statutes of North Carolina (hereinafter the "Act"). The Review Commission has jurisdiction over the parties and the subject matter to this action.
2. Respondent is a North Carolina limited liability company, authorized to do business in North Carolina, is active and in good standing in the State of North Carolina and maintains a place of business in Stoneville, North Carolina. Respondent is an "employer" as defined by N.C.G.S. Section 95-127(11) and it maintains employees as defined by N.C.G.S. Section 95-127(10). Respondent is a 'Manager' managed limited liability company.
3. On March 26, 2020, Compliance Safety and Health Officer Alexa Cherry ("CSHO Cherry") and Compliance Safety and Health Officer Chris Fombin ("CSHO Chris") employed by the North Carolina Department of Labor conducted an inspection (the "Inspection") of Respondent's worksite located at 3801 W Market Street, Greensboro, North Carolina (the "Worksite"). CSHO Cherry and CSHO Chris are collectively referred to as the "Inspectors".
4. The Inspection was a programmed planned inspection pursuant to a Special Emphasis Program for Construction Activities and Special Emphasis Program for Focused Inspections. The Worksite was a multiemployer worksite; the lead person for the general contractor was not at the Worksite at the time the Inspection began. The Inspection was conducted as a comprehensive inspection because CSHO Cherry was unable to evaluate the General Contractor's overall safety and health program.
5. CSHO Cherry testified that the Inspectors attempted to have an opening conversation with Mr. Wilson; initially Mr. Wilson talked with the Inspectors but subsequently refused to talk with them further. The relationship between Mr. Wilson and the Inspectors was not amicable.
6. When Mr. Wilson refused to talk to the Inspectors CSHO Cherry contacted by telephone the general contractors' representative Mr. Dunbar. Mr. Dunbar arrived at the Worksite thereafter, with his safety consultant, Mr. Shelton Bunting; an opening conference was held with Mr. Dunbar and the Inspection continued with the consent of Mr. Dunbar.
7. CSHO Cherry requested Mr. Bunting to intercede and get specific information from Mr. Wilson including documentation that fall protection and ladder training were provided to Respondent's employees at the Worksite, and to request permission for the Inspectors to interview Respondent's employees at the Worksite. After consulting with Mr. Wilson, Mr. Bunting informed the Inspectors that Mr. Wilson (i) denied the request to interview employees, and (ii) provided the identification of his attorney and stated that his attorney should be contacted for information. Later when CSHO Cherry contacted the attorney she was informed

that the attorney was not providing representation to the Respondent relative to this Inspection. Mr. Wilson did not provide, either personally or through Mr. Bunting or an attorney, any documentation showing that fall protection or ladder training were provided to Respondent's employees at the Worksite.

6. As a result of the Inspection, on July 17, 2020, Complainant issued two citations carrying the following proposed abatement dates and penalties (herein collectively referred to as the "Original Citation"):

**CITATION 01 (Willful Serious)**

<u>Item No.</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
001	29 CFR 1926.501(b)(10)	Immediately Upon Receipt	\$ 50,000.00
002	29 CFR 1926.503(a)(1)	Immediately Upon Receipt	\$ 50,000.00

**CITATION 02 (Serious)**

<u>Item No.</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
001	29 CFR 1926.503(b)(1)	Immediately Upon Receipt	\$ 5,000.00

8. The Respondent submitted a timely Notice of Contest to the Original Citation.
9. A Hearing in this matter was scheduled pursuant to the Rules of Procedure of the Safety and Health Review Commission of North Carolina (the "Rules").
10. Respondent and Complainant agreed that the Hearing in this matter shall be conducted via the video conferencing platform known as "Lifesize", the presence of a court reporter during the Hearing is waived, the Hearing's audio and video will be recorded through Lifesize (the "Recording"), the Recording will be the official record of the Hearing, and the Hearing will be deemed to have taken place in Raleigh, North Carolina.
11. Neither Complainant nor Respondent have received notification from any affected employee that such employee, or its representative, wishes to have a say in, or participate as a party in, this matter, or has any objections in connection with this matter including without limitation objection to the reasonableness of any abatement period.
12. Citation 01 Item 001, classified as a "Willful Serious" violation, provided as follows:

“29 CFR 1926.501(b)(10): Each employee engaged in roofing activities on low-slope roofs with unprotected sides and edges 6 feet (1.8m) or more above lower levels, was not protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system:

a) jobsite – employees were exposed to fall hazard approximately 9 feet to hard ground while performing metal roofing activities on a 4:12 low sloped roof without fall protection.”

The Proposed Penalty was \$50,000.00.

13. With respect to Citation 01 Item 001 the following are relevant:

- (i) CSHO Cherry observed 4 workers on the roof;
  - (ii) the roof was a low slope roof (4:12); height of roof was 6 feet or more from hard surface; there were employees of Respondent working on the roof;
  - (iii) workers on roof had no kind of fall protection, and there were no guardrails, no safety net or warning line, and sides of roof were not protected;
  - (iv) a worker on the roof could fall from the roof to the ground; if a worker fell from the roof the type of injury could be permanent disability or death;
  - (v) the workers on the roof were in plain view of Mr. Wilson, and Mr. Wilson knew his workers were on the roof;
  - (vi) Mr. Wilson did not provide to the Inspectors a copy of any written safety and health program or training of employees relating to fall protection; Mr. Wilson did not allow the Inspectors to interview his employees; in general, Mr. Wilson was uncooperative;
  - (vii) Regarding the Penalty calculation: a Severity of medium, with a Probability of greater, and a Gravity of 05 was assigned; no credit was given for Size, Good Faith or History; the Gravity Based Penalty was \$5,000, and the Penalty Multiplier was 10 based on the alleged violation being classified as ‘willful serious’; the Proposed Penalty stated on the Citation was \$50,000.00;
- (vii) Mr. Wilson testified that he had only 3 workers (including himself) at the Worksite, that the roof was flat, that one employee was wearing a harness under his jacket when he was working on the roof, that he daily told his workers about fall protection, and that if a worker fell it was because the worker did not do what he told them to do.

14. Citation 01 Item 002, classified as a "Willful Serious" violation, provided as follows:

"29 CFR 1926.503(a)(1): The employer did not provide a training program for each employee potentially exposed to fall hazards to enable each employee to recognize the hazards of falling and the procedures to be followed in order to minimize these hazards:

a) jobsite – fall protection training was not provided to employees exposed to a fall hazard of 9 feet to the ground. Employees were not using fall protection."

The Proposed Penalty was \$50,000.00.

15. With respect to Citation 01 Item 002 the following are relevant:

(i) CSHO Cherry observed Respondent's workers on a low slope roof 6 feet or more above hard surface without any kind of fall protection, and there were no guardrails, no safety net or warning line; the sides of roof were not protected; if a worker fell from the roof the type of injury could be permanent disability or death;

(ii) Respondent provided no documentation showing that the workers had received fall protection training, and refused to allow the Inspectors to interview the workers;

(iii) the only evidence that any fall protection training was given was Mr. Wilson's testimony that he daily told his workers about fall protection; however, there was no evidence of the content of the information given, the topics covered or verification from any worker that training was received;

(iv) Regarding the Penalty calculation: a Severity of medium, with a Probability of greater, and a Gravity of 05 was assigned; no credit was given for Size, Good Faith or History; the Gravity Based Penalty was \$5,000, and the Penalty Multiplier was 10 based on the alleged violation being classified as 'willful serious'; the Proposed Penalty stated on the Citation was \$50,000.00.

16. Regarding the classification of Citation 01 Item 001 as 'willful' and the classification of Citation 01 Item 002 as 'willful':

(i) there had been five inspections of Respondent prior to this Inspection in which the Respondent (with Mr. Wilson being the lead person) was cited for violations relating to the lack of fall protection; Mr. Wilson on behalf of Respondent entered into various agreements with respect to those citations, agreeing, among other things, to develop and implement written safety and health programs, and training, relative to fall protection; some but not all of the assessed penalties were paid; regarding penalties Mr. Wilson testified he 'paid all I had' and that he has been contacted by a collection agency;

(ii) Mr. Wilson acknowledged that Respondent had received prior citations for violations related to fall protection from roof; Mr. Wilson was aware of the standards cited in Citation 01 Item 001 and Citation 01 Item 002;

(iii) Mr. Wilson acknowledged that in one instance which was subject to a prior citation one of his workers (his son) fell from a roof and suffered a broken pelvis, injured spleen and broken arm; Mr. Wilson was aware of the hazards which can result for a fall from a roof;

(iv) CSHO Cherry testified that the General Contractor said he has had problems with Mr. Wilson regarding fall protection;

(v) when asked about his agreement in one of the prior citations to develop and implement a written safety program, Mr. Wilson testified that he 'already had it'; however, Mr. Wilson did not provide a copy of such program to the Inspectors in this Inspection or at the time of this Hearing;

(vi) the only information provided by Mr. Wilson regarding a fall protection program/training regarding fall protection was Mr. Wilson's testimony that 'every day I tell them what to do'; and

(vii) Mr. Wilson attributes any falls by his workers when working on a roof to the worker not doing what Mr. Wilson told him to do.

17. Citation 02 Item 001, classified as a "Serious" violation, provided as follows:

"29 CFR 1926.1053(b)(1): When portable ladders were used for access to an upper landing surface and the ladder's length allows, the ladder side rails did not extend at least 3 feet (.9m) above the upper landing surface being accessed:

a) jobsite – where an aluminum 20 feet extension ladder used to access and egress the roof was extended 2 feet above the upper landing. The ladder was not secured to prevent movement."

The Proposed Penalty was \$5,000.00.

17. With respect to Citation 02 Item 001 the following are relevant:

(i) CSHO Cherry observed a worker on an aluminum extension ladder the rails of which did not extend at least 3 feet above the roof edge; the ladder was not secured to prevent movement; a photograph of a man on the ladder was shown at the Hearing but was not introduced as an exhibit; the worker on the ladder was not identified at the Hearing; Mr. Wilson testified that he did not know who the man on the ladder in the photograph was or what he was doing;

(ii) CSHO Cherry had been informed by Mr. Dunbar that Respondent was the only contractor on the Worksite; she concluded that only Respondent's workers were at the Worksite; CSHO Cherry reported that she observed employees of Respondent working on the roof at the Worksite;

(iii) on cross-examination CSHO Cherry testified that she observed people walking in the parking lot at the Worksite location when she arrived;

(iv) Mr. Wilson testified that he had only 3 employees (including himself) at the Worksite and that the worker on the ladder shown in the photograph was not his employee;

(v) CSHO Cherry believed that workers on the roof used the ladder to access the roof;

(vi) Mr. Wilson testified: that the ladder did not belong to him (his ladders were fiberglass and not aluminum); that his workers did not use the ladder to access the roof; and that his workers accessed the roof using the roof access from inside the building;

(vii) Complainant presented no evidence that affirmatively disputed that Respondent's workers accessed the roof using the roof access from inside the building, and no definitive evidence that the worker observed on the ladder was an employee of Respondent.

## DISCUSSION

To establish a violation of a specific OSHA standard, Complainant must establish the following elements: (1) the standard applies; (2) the terms of the standard were violated; (3) employees were exposed to the hazard covered by the standard; and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). To establish that the violation should be classified as serious the Complainant must also establish that the hazard created the possibility of an accident and that the substantially probable result of an accident could be death or serious bodily injury. See NCGS 95-127(19); *Commissioner of Labor v Liggett Group, Inc.*, OSHANC 94-3175 (1996); *Commissioner of Labor v Yates Construction Company, Inc.*, OSHANC 93-2967 (1995); *JPC Grp., Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009); *Commissioner of Labor v. Young Construction Co.*, OSHANC 02-4130 (2004). A reasonable person standard is used to determine if an employer knew or should have known of the condition or conduct. *Daniel Construction Co. v. Brooks*, 73 N.C. App. 426 (1984).

Regarding the classification of a violation as 'willful', neither North Carolina statutory nor regulatory law has identified the elements which constitute a 'willful' violation. However cases before the North Carolina Review Commission and the North Carolina courts provide guidance. One approach is to apply a four-part test for a finding of willfulness: (1) employer knowledge of the standard; (2) employer knowledge of the violative condition; (3) a subsequent violation of the standard; and (4) that the violation was being committed voluntarily or with intentional disregard of the standard or with demonstrated plain indifference to the Act. A second approach is that a violation will be deemed willful when there is shown a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another. See *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971) ; *Brooks v O.S. Steel Erectors*, OSHANC 78-396 (84 N.C. App. 630, 353 S.E.2d 869 (1987); *Associated Mechanical Contractors, Inc. v Payne* 342 N.C. 825, 467 S.E.2d 398 (1996); *Commissioner v City of Mt. Airy* Docket No. OSHANC 91-2077 (RB March 25, 1996); *Metro Utility Company, Inc.* NC-OSHA No. 04-4392 (September 30, 2003); *Re-Mulch, Inc.* NC-OSHA No. 09-4912 (April 16, 2010).

To be classified as "willful" it is not necessary that the violation be committed with a bad purpose or with an evil or malicious intent.

Case law from the federal Occupational Safety and Health Review Commission and federal courts is consistent with the holdings of the North Carolina Review Commission and the North Carolina courts. See *James Tull Excavating and Construction Company*, 1978 CCH OSHD P22,602 (Wienman, J. 1978); *Williams Enterprises, Inc.*, 1986-87 CCH OSHD P27,893, 589 (RC 1987) Eric K. Ho, *Ho Ho Ho Express, Inc.*, 20 O.S.H. Cas. (BNA) ¶ 1361, overruled in part on other grounds by *E. Smalis Painting Co.*, 22 BNA OSHC 1553 (No. 94-1979, 2009); *Dayton Tire v Sec’y of Labor*, 671 F.3d 1249 (D.C. Cir 2012)

Complainant has the burden of establishing each element by a preponderance of the evidence. *Commission Rule .0514(a)*; See *Hartford Roofing Co.*, 17 BNA OSCH 1361 (No. 92-3855, 1995). A preponderance of the evidence is “that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false.” *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2131, n. 17 (No. 78-6247, 1981) *aff’d in relevant part*, 681 F.2d 69 (1st Cir. 1982).

If Complainant fails to meet its burden of proof on any one of the required elements, then the violation and/or classification cannot be sustained. An employer who has been issued a citation can present evidence which negates or reduces the validity or strength of Complainant’s evidence offered to support an element; however, the employer does not have the burden to prove that it is not liable for an alleged violation. The burden of proof of the alleged violation rests entirely on the Complainant.

Regarding Citation 01 Item 001 in this case,

- \* Respondent’s employees were performing roofing work on a low-slope roof 6 feet or more above ground level without fall protection – therefore 29 CFR 1926.501(b)(10) was applicable;
- \* Respondent had been cited previously for violation of 29 CFR 1926.501(b)(10) – therefore Respondent had knowledge of the standard;
- \* the workers did not have any form of fall protection – therefore the terms of the standard were violated;
- \* the workers were exposed to a fall of approximately 9 feet to a hard surface – therefore the workers were exposed to a hazard covered by the standard;
- \* Mr. Wilson, the lead person for Respondent, was aware Respondent’s employees were working on the roof without fall protection – therefore the Respondent had actual knowledge of the violation and the violative conditions;
- \* not having fall protection while working on a low-slope roof created the possibility that a worker could fall from the roof – therefore the hazard created the possibility of an accident;
- \* the substantially probable result of a fall from the roof would be serious bodily injury – therefore there was a probable result of serious injury;
- \* the violation of the standard in this case was subsequent to the violations of the standard for which the Respondent was previously cited over a period of years – therefore there was a subsequent violation of the standard;



- \* the violation was being committed by the workers with the knowledge of Mr. Wilson, Respondent's lead person at the Worksite, and Mr. Wilson was taking no action to prevent the violation which evidenced either an intentional disregard of the standard or a plain indifference to the safety of Respondent's workers -- therefore the violation was being committed voluntarily or with intentional disregard of the standard and the safety of his workers;
- \* the penalty was calculated in accordance with the procedures set forth in the North Carolina Field Operation Manual .

Regarding this matter, Complainant carried its burden of proof of a willful serious violation of 29 CFR 1926.501(b)(10) bearing a Proposed Penalty of \$50,000.00.

Regarding Citation 01 Item 002 in this case,

- \* Respondent's employees performing roofing work on a low-slope roof 6 feet or more above ground level were not properly trained regarding proper fall protection, the only training being some verbal instruction of some kind from Mr. Wilson – therefore 29 CFR 1926.503(a)(1) was applicable;
- \* Respondent had been cited previously for violation of failing to provide training regarding fall protection) – therefore Respondent had knowledge of the standard;
- \* the workers did not have any form of training regarding proper fall protection other than some verbal instruction of some kind from Mr. Wilson who testified that he gave such verbal instructions everyday – therefore the terms of the standard were violated;
- \* lack of proper training regarding fall protection while working on a low-slope roof 6 feet above a hard surface exposed the workers to the likelihood of falls – therefore the workers were exposed to a hazard covered by the standard;
- \* Mr. Wilson, the lead person for Respondent, was aware Respondent's employees were working on the roof without training regarding fall protection other than his verbal instructions given every day to the workers – therefore the Respondent had actual knowledge of the violation and the violative conditions;
- \* not having proper training regarding fall protection while working on a low-slope roof created the possibility that a worker could fall from the roof – therefore the hazard created the possibility of an accident;
- \* the substantially probable result of not having proper training would result in workers falling from the roof and such fall would result in serious bodily injury – therefore there was a probable result of serious injury;
- \* the violation of the standard in this case was subsequent to the violations pertaining to training regarding fall protection while working on roofs 9 feet or more from hard lower surface for which the Respondent was previously cited over a period of years – therefore there was a subsequent violation of the standard;
- \* Mr. Wilson was the lead person for Respondent at the Worksite and knew that the workers were receiving only his daily verbal instruction regarding fall protection training and Mr. Wilson was taking no action to implement a training program for the workers relative to fall protection; Mr. Wilson's failure to implement and verify training of

workers evidenced either an intentional disregard of the standard or a plain indifference to the safety of Respondent's workers -- therefore the violation was being committed voluntarily or with intentional disregard of the standard and the safety of his workers;  
\* the penalty was calculated in accordance with the procedures set forth in the North Carolina Field Operation Manual .

Regarding this matter, Complainant carried its burden of proof of a willful serious violation of 29 CFR 1926.503(a)(1) bearing a Proposed Penalty of \$50,000.00.

Regarding Citation 02 Item 001 in this case,

\* CSHO asserted that Respondent's employees were accessing the roof using an aluminum ladder; however, her testimony appeared to be based on information she received from other persons. She did not get that information from Mr. Wilson and she did not get it through interviews with workers of Respondent. Mr. Wilson strongly denied that his workers used the aluminum ladder to access the roof and clearly stated that his workers accessed the roof through a roof hatch inside the building.

Regarding this matter, Complainant did not carry its burden of proof with respect to Respondent's employees being exposed to a hazard created by use of the ladder.

### CONCLUSIONS OF LAW

The foregoing Findings of Fact and Discussion are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

Respondent is subject to the provisions of the Act.

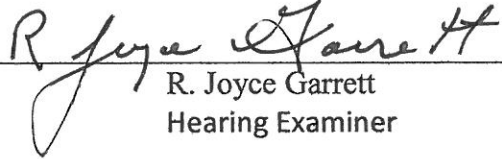
Complainant proved by a preponderance of the evidence that Respondent committed a willful serious violation of 29 CFR 1926.501(b)(10) and 29 CFR 1926.503(a)(1) and that the penalty was calculated in accordance with the Complainant's Field Operations Manual.

**Based on the foregoing Findings of Fact and Conclusions of Law, NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:**

1. Item 001, Citation 01, alleging a willful serious violation of 29 CFR 1926.501(b)(10) is **AFFIRMED** with a penalty assessed of \$50,000.00.
2. Item 002, Citation 01, alleging a willful serious violation of 29 CFR 1926.503(a)(1) is **AFFIRMED** with a penalty assessed of \$50,000.00.

3. Item 001, Citation 02 alleging a serious violation of 29 CFR 1926.1053(b)(1) is **VACATED** and no penalty is assessed.

This 12th day of October, 2022.

  
\_\_\_\_\_  
R. Joyce Garrett  
Hearing Examiner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

KEVIN WILSON  
KMS ROOFING/SHEET METAL, LLC  
544 RIVER RD  
STONEVILLE, NC 27048

By depositing same in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid at Raleigh, North Carolina, and upon:

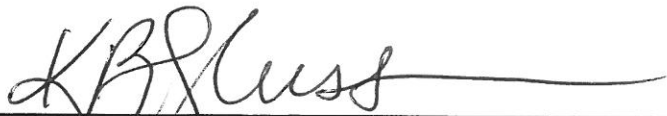
STACEY A. PHIPPS  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
PO BOX 629  
RALEIGH, NC 27602-0629

By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR  
LEGAL AFFAIRS DIVISION  
1101 MAIL SERVICE CENTER  
RALEIGH, NC 27699-1101

via email to [carla.rose@labor.nc.gov](mailto:carla.rose@labor.nc.gov).

THIS THE 19 DAY OF October 2022.



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Karissa B. Sluss  
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